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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN R. PARKER,

Petitioner,

vs.

EVENING POST PUBLISHING CO., AND JIM PARKER,

Respondents.

Petition For A Writ Of Certiorari To The South Carolina Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

LEWIS, BABCOCK & HAWKINS
A. CAMDEN LEWIS, Esquire
Counsel of Record
ELMER KULMALA, Esquire
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

WALTER BILBRO & ASSOCIATES, P.C.
WALTER BILBRO, JR., Esquire
Post Office Box 31699
Charleston, South Carolina 29417
(803) 763-7776

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Does an individual who acquires a corporate ownership interest in a new automobile dealership, which company employs advertising for the new dealership, thereby individually become a public figure with respect to erroneous media reports of his potential individual liability for a judgment obtained against the owners of the former dealership's assets and business location?

2. In a news article about a judgment obtained for the bad acts of a former auto dealership for fraudulently structuring straw purchases, does the media defendant invade the privacy of a private individual who has subsequently acquired an ownership interest through a new corporation of the old dealership's assets, when the media defendant reports that the individual may be personally liable for the judgment against the former dealership?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, John R. Parker, and the Respondents, Evening Post Publishing Co., and Jim Parker. There were no briefs filed *amicus curiae.*

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OPINIONS BELOW

The opinion and judgment of the South Carolina Court of Appeals dated December 19, 1994 is reported at ___ S.C. ___, 452 S.E.2d 640 (1994) and is reprinted in the appendix hereto, at App. 1, *infra.*

The opinion and judgment of the Circuit Court of Charleston County, Judge Richard E. Fields presiding on Petitioner's Motion for a new trial and for Judgment Notwithstanding the Verdict, of August 5, 1992 was not reported, and is reprinted in the Appendix, at App. 2-1, *infra.*

The judgment of the Circuit Court of Charleston County, Judge Richard E. Fields presiding, of March 30, 1992 was not reported, and is reprinted in the Appendix, at App. 5-1, *infra.*

JURISDICTION

Petitioner seeks review of the opinion and judgment of the South Carolina Court of Appeals of December 19, 1994. Petitioner's subsequent Petition for Rehearing was denied on January 26, 1995. The South Carolina Supreme Court denied the Petition for Certiorari on October 5, 1995. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. CONST. amend. I

The text of this provision is reprinted in the Appendix hereto, beginning at App. 6-1, *infra.*

STATEMENT OF THE CASE

On August 3, 1989, the Evening Post Publishing Company[1] published an article by Jim Parker, one its staff writers, concerning the outcome of a lawsuit by Yolanda Adams against Classic Lincoln Mercury, Inc., over the dealership's use of a so-called "Straw Purchase" in the December 1988 financing of Ms. Adams' vehicle purchase. The assets of the Classic Lincoln Mercury dealership later known as Heritage Lincoln Mercury, Inc. were sold subsequent to Ms. Adams' car purchase. Prior to the verdict in August 1989, Petitioner and others established Parker Lincoln Mercury, Inc. Petitioner John Parker had purchased a stock interest but not controlling interest in the new corporate dealership.

In July 1989, the jury in the Adams' lawsuit returned a verdict for Adams which later resulted in a judgment of $716,000.50 actual damages, punitive damages, attorney fees and costs.

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[1] It published two newspapers, *The News and Courier* and *The Evening Post.*

During the course of preparing the August 3, 1989 article, Respondent Jim Parker obtained a copy of the pre-trial brief[2] of Yolanda Adams. The pre-trial brief revealed that in the sale of the dealership, Classic Lincoln Mercury, Inc. may not have complied with the Bulk Sales Act, and that according to an affidavit of Heritage Lincoln Mercury, Inc., filed with the Department of Highways and Public Transportation, Classic and Heritage were one and the same. The pre-trial brief concluded that there may be some risk to Heritage or John Parker (Petitioner) if a judgment were obtained against Classic.

Respondent, Jim Parker reported on August 3, 1989, that: "In the brief, Buckley argues that if the lawyer for Classic lets Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, 'He may be mistaken.' " (App. 8-11).

This lawsuit was filed on September 12, 1990, asserting causes of action for libel and invasion of privacy against the parent company of the then *News and Courier*. Petitioner charged that the August 3, 1989 article falsely equated him, individually, with Parker Lincoln Mercury, Inc., with Heritage Lincoln Mercury, and with Classic Lincoln Mercury, Inc. for purposes of the "straw" purchase frauds found against Classic. The trial court granted directed verdict as to Petitioner's claim for invasion of privacy under the "false light" theory which had not been formally recognized in South Carolina, as well

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[2] A document which, in South Carolina, is only to be provided by counsel to the trial judge, but is not docketed or filed as a public document by the Clerk of Court or trial judge.

as under public disclosure of private facts. The judge instructed the jury that, in order for Petitioner to prevail on his libel claim, he must prove the falsity of the alleged defamatory statement. The trial judge refused to charge libel *per se*, the existing law in South Carolina. The jury returned a verdict in favor of Respondent, and judgment was entered on March 30, 1992.

The South Carolina Court of Appeals affirmed the decision on December 19, 1994, and denied rehearing on January 26, 1995. On October 5, 1995, the South Carolina Supreme Court refused certiorari.

STAGE AT WHICH FEDERAL QUESTION WAS RAISED

The question of libel and invasion of privacy was first raised below in Petitioner's Complaint dated August 9, 1990. (App. 9-1, 7). The invasion of privacy claim was disposed of by directed verdict from the Circuit Court. On the libel claim, the Circuit Court charged the jury on the actual malice standard, implicitly indicating to the jury that Petitioner was a public figure. The jury then ruled against the Petitioner. Petitioner then asked for a new trial or judgement notwithstanding the verdict, both of which were denied. In the Circuit Court's Order on Plaintiff's Post-Trial Motion, the Court stated that "the story was based on information in a court file leads to the conclusion that the constitutional defenses urged by the defendants were correctly applied." (App. 2-3).

The issue was taken up on appeal where the Appellant contended he was a private figure and the subject matter of the article was of purely private concern, thus

placing his libel claim outside the realm of constitutional defamation. The Court of Appeals disagreed and affirmed the lower court decision finding him a public figure. The question was again presented to the South Carolina Supreme Court in Petition for Rehearing, which was denied. (App. 4-1).

REASONS FOR GRANTING THE WRIT

1. This Petition presents for this Court's review, once again, the uneasy co-existence between the freedoms of speech and of the press afforded by the Constitution's First Amendment and the right of the individual to privacy in his private matters and against defamation in the name and sake of news. The Court is asked to decide whether or not the "actual malice" requirement of *New York Times v. Sullivan*, 376 U.S. 254 (1964) is to be applied to Petitioner's libel claim. Resolution of this question requires a consideration of the factors which may qualify an individual as a public figure. Additionally, it is necessary to consider whether the asserted defamatory statement involved a matter of public concern.

The basic rules governing consideration of whether or not a person should be considered a public person were established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), while the rules for determining the public concern of an issue were expressed in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 752 (1985). In *Gertz v. Robert Welch, Inc.*, this Court recognized that an

individual may be a public figure for limited purposes, describing attainment of that status as follows:

> "More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved".

Gertz v. Robert Welch, Inc., at 345.

Additionally, and importantly, *Gertz* permitted the states to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual", so long as they do not impose liability without fault. *Gertz v. Robert Welch, Inc.*, at 347.

South Carolina has clearly elected to allow a private person to pursue a defamation action against a media defendant involving an issue of private concern, without the need for showing "actual malice". *See, Holtzscheiter v. Thomson Newspapers,* ___ S.C. ___, 411 S.E.2d 664 (1992).

In affirming the trial court's determination that proof of actual malice was required, the Court of Appeals has essentially rewritten South Carolina libel law and expanded newspaper immunity beyond any limits expressed in prior decisions of this Court. The South Carolina Court of Appeals concluded that Petitioner was a public figure by virtue of his advertising his role in the automobile sales business. That analysis fails to adequately address the requisites of limited purpose public figure status as contemplated by *Gertz v. Robert Welch, Inc.*, and its progeny.

"A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention . . . a libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*". *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979).

"A person may become a limited purpose public figure if he attempts to have, or realistically can be expected to have a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

There is a two-pronged test to determine whether a given person is a limited-purpose public figure: (1) is there a "public controversy" involved, and what is it?; (2) how did the individual in question involve themself in that controversy to influence its outcome? *See*, Sanford, LIBEL AND PRIVACY, 2d Ed. (Prentice-Hall Law & Business, Looseleaf) at §7.4.2.2, p. 323.

In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) this Court refused to recognize, as a limited purpose public figure, a research behavioral scientist who had sued for defamation when governmental agencies funding his research were awarded the "Golden Fleece" award by U.S. Senator William Proxmire, for egregious waste in government spending. The court reasoned that:

> Hutchinson did not thrust himself or his views into public controversy to influence others. . . .

> Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure.

Hutchinson v. Proxmire, at 135.

In this case, Petitioner, John Parker, could not be a limited-purpose public figure. First, there is no "public controversy" of any sort. Second, John Parker in no way voluntarily inserted himself into the lawsuit between Yolanda Adams and Classic Lincoln Mercury – his group of investors bought a business and the Respondents' article injected Petitioner personally into a role in the lawsuit in which John Parker, personally, played no part. The fact that John Parker owned a stock interest in a new automobile dealership named Parker Lincoln Mercury, Inc., and advertised his management involvement in the new dealership business in the Charleston area, manifestly does not constitute a controversy. Even if the litigation deriving from Classic Lincoln Mercury's use of a straw purchaser is viewed as a public controversy, this in no way suggests that John Parker should thereby qualify as a public figure, because he did not involve or inject himself into that legal controversy and the second prong of the test is not met.

To the extent there may exist a legitimate public interest in information about the previous litigation against Classic Lincoln Mercury involving the straw-man purchase, or public interest in knowing of possible avenues of recovery against successor purchasers of car dealerships, public interest does not meet the requirement for

recognizing a person as a limited purpose public figure. "While availability of goods for sale and their quality are matters of public interest, this is not the test. *The public interest test was expressly rejected in Gertz . . . in favor of the public controversy test*". *Vegod Corporation v. American Broadcasting Companies, Inc., et al.*, 160 Cal. Rptr. 97, 603 P.2d 14 (Cal. Sup. Ct., in bank 1980).

According to Smolla, (Smolla, LAW OF DEFAMATION (Clark, Boardman, Looseleaf), §2.21[8][a], p. 2-70 N.415), "a substantial number of cases involving plaintiffs engaged in various levels of business activity have declared the plaintiffs to be private figures". The note cites numerous cases so holding.[3] In contrast, there are

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[3] *See, e.g., Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed*, 454 U.S. 1130 (1981) (cattlemen held private figure); *Dixson v. Newsweek*, 562 F.2d 626 (10th Cir. 1977) (former airline vice-president private figure); *Mead Corporation v. Hicks*, 448 So.2d 308, 311 (Ala. 1983) (plaintiff businessman involved in garbage collection, waste disposal for nuclear power plant, landfill, grocery, farming, and cattle operations a private figure); *Peagler v. Phoenix Newspapers*, 114 Ariz. 304, 560 P.2d 1216 (1977), *verdict for defendants aff'd after remand*, 640 P.2d 1110 (Ariz. Ct. App. 1981) (president of used car business against whom alleged consumer complaints were lodged a private figure); *Rancho La Costa v. Superior Court*, 106 Cal.App.3d 646, 165 Cal. Rptr. 347 (1980), *cert. denied*, 450 U.S. 902 (1981) (officers of exclusive California resort alleged to be "hangout" for underworld figures held to be private figures); *Forrest v. Lynch*, 347 So.2d 1255 (La.App. 1977), *cert. denied sub nom. Times-Pleayune v. Forest*, 435 U.S. 971 (1978) (consulting engineer on public project held to be private figure); *Zetes v. Richamn*, 336 N.Y.S.2d 778, 86 A.D.2d 746 (4th Dept. 1982) (seller of Olympic souvenirs a private figure); *Grove v. Three Village Herald*, 420 N.Y.S.2d 3, 69 A.D.2d 175 (2d Dept.

apparently no cases holding a business person to be a public figure, general or limited purpose, based solely upon his advertising activities, as did the South Carolina Court of Appeals.

Rather than relying solely upon the two-prong test for determining limited purpose public figure, it appears that the Court of Appeals has confused the factors for public figure with the question of whether or not the issue was one of public concern.

Whether "speech addresses a matter of public concern must be determined by [the expression's] content, form and context . . . as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), citing *Connick v. Myers*, 461 U.S. 138 (1983).

"A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. . . . If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy". *Waldbaum v. Fairchild Publications, Inc.* at 1296-1297.

1979), *aff'd mem.*, 49 N.Y.2d 932 (1980) (owner of shopping center private figure); *Martin v. Griffin Television*, 549 P.2d 85 (Okla. 1976) (owner of pet store accused of poor care of pets a private figure); *Taskett v. KING Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976) (advertising agency head alleged to have appropriated clients' money a private figure).

Applied to the case at bar, this reasoning demonstrates that Petitioner's potential liability is a private matter which is not central to, but severable from the outcome of a lawsuit against a dealership over straw purchasers which may be an issue of public concern.

2. With respect to invasion of privacy/public disclosure of private facts, Petitioner, John Parker, respectfully asserts that the South Carolina Court of Appeals has misapprehended as "information of legitimate public interest" those statements published in Respondents' article pertaining to the potential liability of John Parker, the individual, deriving solely from Classic's non-compliance with the Bulk Sales Act, which was not mentioned in the article, and not from any conduct or activity of John Parker.

While there may exist legitimate public interest in the outcome of litigation against a car dealership employing straw purchasers, whether or not a judgment obtained against such a dealer might be enforceable against a successor in interest on the chance of non-compliance with the Bulk Sales Act, certainly does not rise to that level.

The article of August 3, 1989, went further than necessary and made public disclosure beyond the legitimate public aspect of the issue, and disclosed the private information which strongly suggested Petitioner, John Parker's personal liability on the judgment against Classic for wrongs (fraud) in using a "staw purchaser". In further reporting John Parker's purported potential personal liability for a judgment obtained in the "Classic" case, Respondents clearly and unnecessarily publicized private

information affecting the personal and financial life of John Parker, the individual.

The standard by which invasion of privacy is determined in South Carolina is provided by *Holtzscheiter v. Thomson Newspapers*. In that case, the overall story was clearly one about a matter of public concern: the murder of the plaintiff's daughter at the age of seventeen years. Nonetheless, the parts of the story about Holtzscheiter herself, which described (inaccurately, Holtzscheiter claimed) her relationship with her daughter and attempted thus to illustrate to the public the dangers to young people of a home life without sufficient parental involvement, were characterized by the majority as facially libel *per se* if untrue, the dissent simply felt that the evidence at the close of plaintiff's case demonstrated that the allegedly defamatory statements were "substantially true". The opinion thus differentiated between public interest parts of a news story and private interest parts of a news story.

Holtzscheiter is precisely analogous to the case at bar: it is a matter of public interest that a $700,000.00 verdict is obtained against a car dealer for use of a straw purchaser; it is not a matter of public interest whether a new owner of the assets of the defendant dealership might, due to what appears to be a highly unusual set of technical circumstances having to do with the Bulk Sales Act, be liable, (to the extent of the worth of the purchased assets, which was another matter not mentioned in the article), for some portion of the verdict, just as it was not a matter of public interest whether Ms. Holtzscheiter's murdered child had "support" at home, the absence of which might have led her to be in a situation of vulnerability.

The facts in question are not the simple disclosure that Mr. Parker had bought the dealership, which fact,

indeed, is not private information. The facts involved are those which say or intimate that Mr. Parker is responsible for the conduct of Classic, or for the debt of Classic, simply on account of his having bought Classic's assets.

Clearly, there is no public interest in John Parker's asset purchase, through a new corporation, of the assets of Classic as even an ancillary to wrongs by Classic in using a straw purchaser. Nor is it of public concern that a lawyer alleged that that purchase, owing to a possible technical matter relating to the Bulk Sales Act, not even mentioned in the article, and not being related to any conduct or action by Mr. Parker, may render the new corporation libel in a pass-through sense for the judgment against Classic.

The effect of individually including Petitioner, John Parker, in Respondents' article as having potential liability, was clearly a separate issue, of a private nature, which should not have been included in Respondents' article which presented the issues of public interest relating to the lawsuit over fraudulent straw man purchases. The South Carolina Court of Appeals' affirmance of directed verdict on invasion of privacy simply fails to recognize or acknowledge either the private nature of facts disclosed suggesting Parker's potential liability or the severability of the public and private issues.

CONCLUSION

The opinion of the South Carolina Court of Appeals represents a radical and unjustified constitutional diminution of the privacy rights of the individual with a

concomitant expansion of newspaper immunity. In reaching its decision, the Court of Appeals ignored the well-recognized requirements for becoming a limited-purpose public figure and focused upon mere public interest rather than true public controversy, and emphasized dealership advertisement so as to make John Parker (the individual), a public figure, which he individually clearly was not.

With respect to the invasion of privacy claims, again the Court erroneously regarded the information disclosed in the article as information of public, rather than private concern. As a consequence, Petitioner John Parker (the individual) was falsely identified with the fraudulent wrongs proven against the "Classic" dealership (the former owner). Petitioner respectfully asks this Court to grant certiorari to review these errors of the South Carolina Court of Appeals.

Respectfully submitted,

A. Camden Lewis
Elmer Kulmala
Lewis, Babcock & Hawkins, LLP
1513 Hampton Street
P.O. Box 11208
Columbia, SC 29211
(803) 771-8000

Walter Bilbro &
Associates, P.C.
Walter Bilbro, Jr., Esquire
P.O. Box 31699
Charleston, SC 29417
(803) 763-7776

Attorneys for Petitioner

Columbia, South Carolina

December 2, 1995

APPENDIX 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John R. Parker, ... Appellant,

v.

Evening Post Publishing Co., and Jim Parker .....
Respondents.

Appeal From Charleston County
Richard E. Fields, Circuit Court Judge

Opinion No. 2277
Heard November 1, 1994 – Filed December 19, 1994

AFFIRMED

Walter Bilbro, of Charleston; and A. Camden Lewis, of Lewis, Babcock & Hawkins, of Columbia, for appellant.

Jay Bender and Charles E. Baker, both of Columbia; and D.A. Brockington, Jr., of Charleston, for respondents.

HOWELL, C.J.: John Parker brought libel and invasion of privacy actions against the Evening Post and Jim Parker, one of its reporters (Defendants). The trial court granted a directed verdict to the Defendants on the privacy claim at the close of Parker's evidence, and the jury returned a defense verdict on the libel claim. Parker appeals. We affirm.

In December 1988, Parker contracted to purchase the assets of Classic Lincoln-Mercury, Inc. (Classic), an automobile dealership then doing business in Charleston under the name of Heritage Lincoln-Mercury (Heritage). At the same time, Parker contracted to become the manager of Classic pending the closing of the assets sale. Parker had formerly been an automobile dealer in Charleston from 1982-1988 and, after assuming management of Classic, he ran newspaper and radio ads announcing that he was back in the car business at Heritage.

In March 1989, Parker formed Parker Lincoln-Mercury, Inc. to operate the dealership after the closing of the sale in May 1989. The closing memorandum prepared in connection with the sale provided that "in lieu of [Classic's] compliance with the South Carolina Bulk Sales Act," Classic would pay all creditors when due and would indemnify Parker.[1] At the time of the sales agreement and the closing, Yulonda Adams had a lawsuit pending against Classic for fraud, conversion, and violations of the car dealer's unfair trade practices act (S.C. Code Ann. §§ 56-15-30 to -40 (1976)).

In June 1989, Adams submitted a pre-trial brief pursuant to Rule 16(c), SCRCP, in her action against Classic. This brief stated in pertinent part:

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[1] Under the Uniform Commercial Code-Bulk Transfers Act, S.C. Code Ann. §§ 36-6-101-111 (1976), the transfer in bulk of all or a major part of the inventory of a business is not effective against existing creditors of that business unless the transferee gives notice to the creditor at least ten days before the transferee takes possession of or pays for the goods. S.C. Code § 36-6-105. We will refer to the act, as do the parties, as the Bulk Sales Act.

UNUSUAL MATTERS

> The only unusual matter in this case involves the identity of the Defendant. Apparently, the dealership was sold, and the name was changed to Heritage Lincoln Mercury, Inc. Subsequently, the dealership was again sold to John Parker, and it is now John Parker Lincoln-Mercury, Inc. However, the Defendant [Classic] made no attempt to comply with the Bulk Sales Act, and Heritage has filed an affidavit with the South Carolina Department of Highways and Public Transportation swearing that Classic and Heritage are one and the same dealership. Therefore, if the Defendant's [Classic's] attorney believes that his client can sit back and let Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, he may be mistaken.

This part of the brief would later be referred to and quoted from in the newspaper article, and it is the principal matter giving rise to the present lawsuit.

In July 1989, a jury returned a verdict for Adams against Classic, resulting in a judgment of $716,000.50 for actual damages, punitive damages, attorney's fees, and costs. On August 3, 1989, the Evening Post ran an article authored by the reporter and entitled "Car buyer awarded $700,000 in dispute." This article appeared on the first page of the Region section and continued on the third page.

The article opened: "A *former* Charleston car dealership has been ordered to pay nearly $700,000 to a local woman." (emphasis added). The remainder of the first page of the article cites the attorneys for both sides and Adams' pretrial brief as sources for its summary of the

allegations, referring to the defendant as Classic Lincoln-Mercury, Inc. or Classic six times. The brief was the major source for the factual information in the article regarding Adams' claim against Classic, and the article repeatedly identified the brief as a source. The article also noted that, according to its attorney, Classic had appealed the case.

The article continued on page 3-B of the newspaper, identifying the same three sources of information – the two attorneys and the brief. The two paragraphs giving rise to the present lawsuit state in full:

> It's unclear who is liable in this case. Classic *since has been sold,* first becoming Heritage Lincoln Mercury, Inc. and now *John Parker Lincoln-Mercury, Inc.* In *the brief,* Buckley [Adams' attorney] *argues* that if the lawyer for Classic lets Mrs. Adams obtain a judgment against Classic *without risk* to Heritage or *John Parker,* "he *may be* mistaken." Gowder [Classic's attorney] said since the case is on appeal, there's no reason to speculate on liability. (Emphasis added).

The article continues to report the matter, but the remainder is not in the record except for a few sentences of the paragraph following the above-quoted paragraphs. The article did not mention the Bulk Sales Act, the brief's basis for the liability of Parker's dealership.

On August 9, 1989, Adams filed an amended complaint against Parker and his dealership for recovery of her judgment against Classic from the assets bought by Parker, alleging that Parker had actual notice of Adams' pending claim at the time of the assets sale and did not give her notice prior to the assets transfer, thus violating the Bulk Sales Act. Adams ultimately settled this lawsuit

against Parker and his dealership for $30,000 "paid by or on behalf of" them whereby Adams, *inter alia*, agreed to apply the $30,000 to the judgment against Classic. Parker apparently did not personally provide any of these monies – it appears that Classic paid pursuant to the indemnification clause in the closing Memorandum acknowledging non-compliance with the Bulk Sales Act.

On appeal, Parker argues (1) the trial court improperly charged the jury on his libel claim; (2) the trial court improperly directed a verdict against his privacy claim; and (3) the trial court improperly denied his new trial motions based on the "thirteenth juror" doctrine and juror misconduct.

I.

The jury returned a verdict in favor of the Defendants on parker's libel claim. On appeal, Parker challenges the jury charge on his libel claim, arguing that the trial court improperly placed on him the burden of proving falsity of the statements in the article. Parker contends he is a private figure and the subject matter of the article was of purely private concern, thus placing his libel claim outside the realm of constitutional defamation created by *New York Times Co. v. Sullivan*[2] and its progeny. We disagree.

At common law, a plaintiff can recover damages for a false spoken or written statement which damages his reputation if he can show that the statement (1) had a

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[2] 376 U.S. 254 (1964).

defamatory meaning; (2) was published with actual or implied malice; (3) was false; (4) was published by the defendant; (5) concerned the plaintiff; and (6) resulted in presumed damages or in special damages to the plaintiff. F.P. Hubbard & R. L. Felix, *The South Carolina Law of Torts* 390-91 (1990). However, the common law presumed a defamatory statement to be false, and it was considered error to instruct the jury that the plaintiff must prove falsity. *Id.* at 398.

In *Sullivan*, however, the United States Supreme Court recognized that the First Amendment's guarantees of freedom of speech and of the press place certain limits on the right of the states to award damages in a libel action. 376 U.S. at 256. These limitations are necessary to ensure free and unfettered discussion of matters of public concern, because "[t]he protection of the public requires not merely discussion, but information. . . . Whatever is added to the field of libel is taken from the field of public debate." *Id.* at 272. Thus, a public official may recover damages for defamatory statements relating to his official conduct only if he proves that the statements were made with actual malice. *Id.* at 279-80. The *Sullivan* rule also applies to libel actions brought by public figures. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The same First Amendment concerns likewise invalidate some of the common law defamation requirements in cases involving private figures and matters of public concern. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also* Hubbard & Felix, supra, at 415-16. Thus, in private figure cases involving matters of public concern, the common law presumption of falsity is invalid – the plaintiff must prove the statement was false. *Philadelphia Newspapers,*

Inc. v. Hepps, 475 U.S. 767 (1986). Therefore, as Parker conceded at oral argument, the dispositive issue here is whether the article involved a matter of public concern. If so, then Parker's claim is governed by *Hepps*, and the jury was properly charged.[3]

The article Parker challenges discussed Classic's use of a "straw purchase" in the sale of a car to Adams, and Classic's subsequent repossession of the car. The article focused primarily on Classic and its actions, and clearly attributed the actions giving rise to the Adams lawsuit to Classic. While lawsuits and other items of public record are generally of concern to the public, the Adams lawsuit was of particular importance to the public in that it involved allegations of fraud and unfair trade practices. Given the nature of Classic's conduct, the public certainly had a valid interest in the Adams lawsuit. The article informed the public of the pitfalls of some consumer credit transactions, and served to warn the public about certain unfair credit practices. That the new owner of the

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[3] Thus, whether or not Parker is considered a public figure, his claim is subject to the requirements of *Hepps* if the challenged statements involve matters of public concern. However, we believe that by extensively advertising his return to the car business, Parker became a public figure, at least in the limited area of his business dealings. *See Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S.C. 1989) (plaintiff who advertised its business extensively became limited public figure in defamation action based on broadcast questioning the plaintiff's manner of conducting business). Through his advertising campaign, Parker invited the public's attention and assumed the accompanying risk of that attention. Thus, as to statements regarding Parker's dealership, it seems clear that Parker is a public figure.

dealership, for whatever reason, might bear some responsibility for the damages awarded in the lawsuit is likewise of public interest. The public has a legitimate interest in being informed of potential methods for collecting a judgment, particularly when the judgment resulted from unfair credit practices.[4] This conclusion is reinforced by *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956), the seminal South Carolina privacy case.

In *Meetze*, the plaintiff was a married twelve-year-old girl who had given birth to a child. In a brief visit with reporters at the hospital, she specifically stated that she did not want any publicity and refused to give an interview (as did her husband), but the newspaper nevertheless reported the birth and identified the parents. The trial court sustained the newspaper's demurrer to the plaintiff's claim for invasion of privacy, and the Supreme Court affirmed, finding that it was rather unusual for a twelve year-old girl to give birth to a child, and it was a "biological occurrence which would naturally excite public interest." *Id.* at 338; 95 S.E.2d at 610.

Here, it is undisputed that the judgment against Classic Lincoln-Mercury was a matter of public interest, and that Parker's purchase of the dealership was not private

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[4] The fact that the article did not mention that Parker's liability stemmed from a violation of the Bulk Sales Act does not render the article inaccurate or somehow negate the public interest in the article. Regardless of the source of Parker's liability, the public has a right to know that, at least in some circumstances, the purchaser of a business may be responsible for debts of that business.

information. It is likewise undisputed that, prior to publication of the article, Parker voluntarily conducted an intensive newspaper and radio advertising campaign announcing his connection with the former dealership and inviting the public to conduct business with him. Parker invited the public's attention to his purchase of the dealership; he cannot now say that the public has no legitimate interest in his potential liability for a judgment obtained against that dealership. Parker, by his own acts, whether willingly or not, became connected with the occurrence of the judgment against Classic Lincoln-Mercury and, therefore, the publication of his connection with the occurrence was not an invasion of privacy. If the public has a legitimate interest in knowing that a twelve year-old girl gave birth to a child as a matter of law, it likewise has a legitimate interest in knowing that the purchaser of a car dealership may be liable for the debts of the former owner as a matter of law. Accordingly, we find the entire article, including the limited references to Parker, involved matters of public concern.

Because the entire article involved matters of public concern, Parker's libel claim falls squarely within the framework of *Sullivan*, *Gertz*, and *Hepps*. The trial court therefore properly placed on Parker the burden of proving falsity. Moreover, viewing the evidence and reasonable inferences in the light most favorable to Parker, we find that the article was substantially true as a matter of law. This is an absolute defense that moots all jury charge questions. *See Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976) (affirming directed verdict granted to the newspaper); *Dauterman v. State-Record Co.*, 249 S.C. 512, 154 S.E.2d 919 (1967) (affirming judgment

notwithstanding the verdict granted to the newspaper); *Haulbrooks v. Overton*, 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988) (affirming directed verdict to television station). The jury returned a defense verdict, and we may affirm this result for any reason appearing in the record. *See* Rule 220(c), SCACR.

II.

The trial court directed a verdict against the cause of action Parker characterized as "False Light/Invasion of Privacy." Noting the absence of any South Carolina authority recognizing the tort of "false light," the trial court treated the claim as one of invasion of privacy, that is, public disclosure of private facts. Parker acknowledged the absence of South Carolina authority on "false light," but summarily argued it should be recognized as a tort. The trial court's ruling focused on the undisputed fact that Parker had announced his involvement with the car dealership to the public prior to the article. Parker conceded this made his involvement somewhat public, but he argued that the article went further and exposed his financial situation (potential liability to Adams), and "that is why it is an invasion of his privacy."

On appeal, Parker focuses on the tort for public disclosure of private facts, although he continues to argue summarily that South Carolina should recognize the tort of false light.[5] Parker concedes that his purchase of the

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[5] We find that Parker's appellate argument regarding false light is so conclusory as to be an abandonment of the issue and, therefore, we do not to consider whether this tort exists under

dealership was not private information, but he argues any potential liability for the acts of, or judgment against, Classic Lincoln-Mercury due to the operation of the Bulk Sales Act was not a matter of public concern. We disagree.

A cause of action for public disclosure lies only for disclosure of private facts which are of no legitimate public concern. *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984). Because we have already held that the article involved matters of public concern, Parker's privacy claim must fail.[6] We do not overlook Parker's argument that our Supreme Court in *Holtzscheiter v. Thomson Newspapers, Inc.*, 306 S.C. 297, 411 S.E.2d 664 (1991) found that a seventeen year-old girl's lack of family support was a private matter, although her murder was a public matter, and that the present case likewise presents a situation of general public interest with private matter elements. However, as previously discussed, we find that the entire article, including the references to Parker, involved matters of legitimate public concern. *Holtzscheiter* therefore provides no assistance to Parker. Accordingly, the trial court properly directed a verdict against Parker's invasion of privacy claim.

South Carolina law. *See Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991).

[6] Parker acknowledged at oral argument that if the statements in the article were of legitimate concern to the public, both his libel and invasion of privacy challenges would fail.

III.

The trial court denied Parker's post-trial motion for a new trial under the "thirteenth juror" doctrine. Under this doctrine, the trial court may take its own view of the evidence and grant a new trial if it disagrees with the jury's verdict. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). On appeal, our standard of review is limited to whether any evidence supports the trial court's decision; thus, we must view the evidence and all reasonable inferences therefrom in favor of the trial court's ruling. *Id.* Therefore, to reverse the denial of a new trial motion under this doctrine we must, in essence, conclude that the moving party was entitled to a directed verdict at trial. We find that ample evidence supports the trial court's denial of the motion, and we therefore affirm.

The trial court also denied Parker's motion for a new trial upon the ground that the court erred in refusing to excuse a juror during trial and replace her with the alternate juror. Parker contends the juror exhibited disruptive conduct during the trial, including impatience with the length of the trial and a desire to go home at 5:00 p.m. during the five days of trial.[7]

---

[7] Parker also appears to argue that the jury did not give due and serious consideration to the case, because it returned a verdict in one hour, thereby ending their deliberations one-half hour before the NCAA basketball tournament was to begin on television. This is rank speculation without any evidentiary support, and we find it to be manifestly without merit. *Cf. Bratton v. Lowry*, 39 S.C. 383, 17 S.E. 832 (1893) (new trial not warranted where one juror advised the trial judge that some jurors had said the jury rendered a hasty verdict due to an alarm of fire in the town).

The determination of whether any person has a coercive effect on a jury for any reason is a matter addressed to the sound discretion of the trial judge. *See Blake v. Spartanburg General Hosp.*, 307 S.C. 14, 413 S.E.2d 816 (1992) (affirming trial judge's conclusion that bailiff's improper comments to the jury warranted new trial). The test is whether there is reason to suppose outside influences affected the jury's verdict. This determination rests within the sound discretion of the trial court, because the court has the opportunity to view the trial, the character and intelligence of the jurors, and to consider whether the verdict, in light of the evidence, has so little support as to indicate corrupt or improper influence. *Id.; see also Morris v. Jensen*, 309 S.C. 153, 420 S.E.2d 710 (Ct. App. 1992) (no abuse of discretion in refusing new trial where juror stated that forelady, whose husband had been involved in an accident similar to that at trial, was so overbearing that she convinced other jurors to vote in a manner they might not have otherwise voted; juror's unsworn statement was not competent evidence of undue influence, and the trial judge found that the evidence supported the jury's verdict).

Here, the record contains no competent evidence that the juror unduly influenced the jury or its verdict. During its deliberations, the jury requested that a crucial exhibit be sent to the jury room, thereby demonstrating its serious consideration of the case. The trial court polled the jury after its verdict, and each juror affirmatively stated that it was his or her true verdict. Finally, there is ample evidence in the record to support the jury's verdict. We therefore find no abuse of discretion in the trial

court's denial of the new trial motion or the refusal to seat the alternate juror.

Accordingly, for the foregoing reasons, the judgment below is hereby

AFFIRMED.

SHAW and GOOLSBY, JJ., concur.

APPENDIX 2

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS
John R. Parker, Plaintiff, vs. Evening Post Publishing Co., and Jim Parker, Defendants.	)	ORDER ON PLAINTIFF'S POST-TRIAL MOTION C. A. NO. 90-CP-10-3649

This action was commenced by the plaintiff to seek damages for libel and invasion of privacy. The news story provoking this litigation reported on a suit by Yulanda Adams (Adams) against Classic Lincoln Mercury, Inc., (Classic) a Charleston automobile dealership. By the time the Adams case was tried, the automobile dealership had been sold by Classic to the plaintiff and his partner Jack Mills. The news story reported that the plaintiff might have liability for the consumer's judgment against Classic.

This case was tried in March before a jury. At the close of the plaintiff's case, defendants moved for a directed verdict. The motion was granted as to the privacy claim, but denied as to the libel claim.

At the close of all evidence, defendants moved for a directed verdict as to the libel claim. The motion was denied, and the case sent to the jury. The jury returned a verdict for the defendants. The court now has before it a

motion by the plaintiff for a new trial or judgment notwithstanding the verdict. The plaintiff asserts that the court erred in requiring the plaintiff to prove that the news story was false, published with fault on the part of the defendants and caused actual injury to the plaintiff; that the invasion of privacy claim should have been for the jury, and that the jury verdict was unjust.

As he had at trial, plaintiff argues that the communication involving the plaintiff was not of public concern, and the controlling law is the common law of libel unmodified by the constitutional defenses recognized in cases involving communication of material in the public interest. *Dun & Bradstreet, Inc. v. Greenmoss Builders. Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

The *Dun & Bradstreet* case involved the dissemination by Dun & Bradstreet of an erroneous credit report to five subscribers, none of whom could disseminate the information further. *The Dun & Bradstreet* facts are easily distinguished from the facts before the court here. The question regarding the plaintiff's liability on the Adams' judgment was posed initially by Adams' attorney in his pre-trial brief. The evidence at trial established that the pre-trial brief was placed in the court's file along with the judgment and other papers following the trial. It has long been the law of South Carolina that documents related to judicial proceedings are public records, *Lybrand v. The State Co.*, 179 S.C. 208, 184 S.E. 580 (1936), and court proceedings are public events about which the public has a legitimate interest in learning the facts. *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982). A determination of what is in the public interest is not to be narrowly made because the constitutional guarantee of freedom of

the press allows the public to obtain information necessary on a wide range of topics "to cope with the exigencies of their period." *Thornhill v. State of Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 quoted in *Time. Inc. v. Hill*, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967).

Utilizing the Supreme Court's broad definition of what is in the public interest, and recognizing that the story was based on information in a court file leads to the conclusion that the constitutional defenses urged by the defendants were correctly applied. *Philadelphia Newspapers. Inc. v. Hepps*, 475.U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789. (1974).

The plaintiff's privacy claim was styled in the complaint as one for "false light," but at trial the plaintiff was allowed to amend his complaint to assert a claim for the publication of private matters of no legitimate public concern. At the close of the plaintiff's case, defendants moved for, and this court granted a motion for directed verdict on grounds that there were no private matters regarding the plaintiff published by the defendants. The news story reported that Adams had been awarded a judgment against Classic. The story reported that the Classic dealership had been sold, first becoming Heritage Lincoln Mercury, Inc., and ultimately John Parker Lincoln Mercury, Inc. This information reported was from the Adams' pre-trial brief which contained minor errors regarding the corporate status of Heritage (it was not a corporation, but a trade name for Classic) and the Parker dealership (the actual name of the dealership was Parker

Lincoln- Mercury, Inc.). These errors were immaterial to the plaintiff's claim of invasion of privacy. The plaintiff testified that at the time he purchased the dealership from Classic, he purchased it in partnership with Jack Mills. The corporation known as Parker Lincoln-Mercury, Inc., was not formed until the purchase had been made. Additionally, the plaintiff testified that he purchased advertising to announce that he was the new owner of the dealership. None of the evidence offered by the plaintiff supported the claim that the news story publicized private affairs of no legitimate public concern. As the Supreme Court of South Carolina has said, when a person, whether willingly or not, becomes involved in an occurrence of public or general interest, the publication of his connection to that occurrence is not the basis for a claim of invasion of privacy. *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1957). Further, when the identity of the individual with an occurrence becomes known to the public as a consequence of acts of the individual, it is clear that no claim arises for invasion of privacy. *Satterfield v. Lockheed Missiles and Space Company, Inc.*, 617 F.Supp. 1359 (D.C.S.C. 1985). Accordingly, the directed verdict was appropriate.

Plaintiff also seeks a new trial on the facts, asking the court to act as a "thirteenth juror" to set aside the jury's verdict. The court has broad discretion to grant new trials when the court is convinced that "a new trial is necessitated on the basis of the facts in the case." *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 at 45 (1984). But, as the Supreme Court of South Carolina noted in *Graham*, the discretion to grant new trials in such instances "has been used sparsely and rightly so." *Id.* The court has the

authority to grant a new trial when the court finds that the evidence does not justify the verdict, *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990), but the court is not permitted to invade the province of the jury or substitute the court's verdict for that of the jury. *Turner v. Carey*, 227.S.C. 298, 87 S.E.2d 871 (1955). In ruling on plaintiff's motion, the evidence presented at trial must be viewed in the light most favorable to the defendants. *Ray v. Simon*, 245 S.C. 346, 140 S.E.2d 575 [1975); *Southeastern Mobile Homes, Inc. v. Walicki*, 282 S.C. 298, 317 S.E.2d 773 (Ct. App. 1984). Applying these principles to the case at hand, it appears there was sufficient evidence to support the jury's verdict for the defendants. Such evidence, taken in the light most favorable to the defendants, supports the verdict, and a new trial on the facts is not appropriate.

The plaintiff also claims that the jury verdict was reached in haste because the jurors wished to end their jury service, but the plaintiff offers no showing to support this claim. A claim of juror misconduct must be shown to have affected the impartiality of the jury and resulted in actual harm to the complaining party. 58 Am.Jur.2d *New Trial* §212. Even had the jury, or members of it been restless, the plaintiff and defendants endorsed the court's charge on the importance of jury service. The jury reached a unanimous verdict, and for the court to give weight to the perception that one or more jurors was not fully attentive would be an invasion of the providence of the jury. Under these circumstances it does not appear that the plaintiff is entitled to a new trial on grounds of juror misconduct.

Finally, defendants argue that the plaintiff's motion for a judgment notwithstanding the verdict is inappropriate on grounds that the plaintiff failed to satisfy the requirements of Rule 50(b) *SCRCP* as to the libel cause of action. Having fully addressed all the relevant issues, it is not necessary to reach the defendants' argument.

Based on the foregoing discussion, IT IS HEREBY ORDERED that the plaintiff's motion be, and the same hereby is denied.

AND IT IS SO ORDERED.

/s/ Richard E. Fields
RICHARD E. FIELDS
Resident Judge
Ninth Judicial Circuit

Charleston, South Carolina

August 5, 1992

ATTEST: A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK, C.P. & G.S.
By: /s/ Ann E. Dro
DEPUTY CLERK

APPENDIX 3

THE SOUTH CAROLINA COURT OF APPEALS

John R. Parker,

Appellant,

v.

Evening Post Publishing Co.,
and Jim Parker,

Respondents.

ORDER DENYING PETITION
FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

/s/ William Howell , C.J.

/s/ Curtis G. Shaw , J.

(I would grant a rehearing)

/s/ C. Tolbert Gollsby , J.

Columbia, South Carolina

January 26 , 1995.

APPENDIX 4

[SEAL]

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

October 5, 1995

RECEIVED – 6 1995

Walter Bilbro, Jr., Esquire
11 Gamecock Avenue
Post Office Box 31699
Charleston, SC 29417-7699

A. Camden Lewis, Esquire
Pete Kulmala, Esquire
Lewis, Babcock & Hawkins
Post Office Box 11208
Columbia, SC 29211

Re: John R. Parker v. Evening Post Publishing Co., & Jim Parker

Gentlemen:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above-entitled matter:

"Petition for Writ of
Certiorari denied.

/s/ Ernest A. Finney, Jr. C.J.
For the Court

October 5, 1995."

By copy of this letter we are advising all interested parties of this action.

Very truly yours,

/s/ Brenda T. Shealy

DEPUTY CLERK

BFS/sbm

Copy to: Jay Bender, Esquire
Charles Baker, Esquire
D.A. Brockinton, Jr., Esquire
The Honorable Julie Armstrong
The Honorable Kenneth Richstad
West Publishing Company

APPENDIX 5

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON COMMON PLEAS COURT		JUDGMENT IN A CIVIL CASE CASE NO. 90-CP-10-3649
John R. Parker Plaintiff(s)	VS	Evening Post Publishing Co. et al Defendant(s)

[X] Jury Verdict. This action came before the court for a trial by jury The issues have been tried and the verdict rendered.

[ ] Decision by court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] Action Dismissed. [ ] Rule 12(b), SCRCP [ ] Rule 40(c)(3), SCRCP [ ]Rule 41(a), SCRCP (Vol. Nonsuit) [ ] Settled [ ] Other, Explain: _____

IT IS ORDERED AND ADJUDGED: [X] See attached verdict [ ] Statement of Judgment by Court

Judgment for the defendant.

Dated at Charleston, South Carolina, this 27th day March, 1992.

/s/ Richard E. Fields
Judge

This judgment was entered on the 30 day of March, 1992, and copy mailed first class this 19 day of Aug., 1992, to

attorney of record or to parties (when appearing *pro se*) as follows:

Walter Bilbro, Jr. Grover Seaton Randall Chastain Attorney(s) for Plaintiff(s)	Jay Bender D. A. Brockinton, Jr. Attorney(s) for Defendant(s) /s/ Howard J. Taylor

APPENDIX 6

U.S. CONST.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Car buyer awarded $700,000 in dispute

By JIM PARKER
Post-Courier Reporter

A former Charleston car dealership has been ordered to pay nearly $700,000 to a local woman whose unwitting role in a "straw" deal ended up, from her viewpoint, as a raw deal.

Circuit Judge Ralph K. Anderson served a judgment Friday on Classic Lincoln Mercury Inc. to pay $42,600 in actual damages and $642,600 in punitive damages to Yulonda Adams, as well as $30,800.50 in attorney's fees and costs.

Anderson reduced the award from the nearly $1.2 million granted by a Charleston County jury earlier last week. Even so, the award could be the largest ever under the state's consumer protection statutes, said Edward D. Buckley Jr., one of two lawyers representing Mrs. Adams.

Typically, "lawyers don't like these cases because there's no insurance" to cover the damage costs, Buckley said. "I think that's great. You shouldn't have an insurance company pay for somone ripping people off."

W. Andrew Gowder Jr., the lawyer representing Classic, said Wednesday the case has been appealed. Grounds will include "a whole host" of legal objections, he said.

In regard to the judgment, Gowder said, "It's an extraordinarily large award for a state court in South Carolina, particularly when the actual damages were $14,000."

The judge's actual damage figure is based on triple the stated $14,000 value of a 1988 Mercury Tracer that Mrs. Adams bought in October 1987 at the dealership.

According to a pretrial brief filed on behalf of Mrs. Adams, she traded a 1977 Oldsmobile Cutlass and made a $1,000 down payment on the Mercury Tracer.

Mrs. Adams' credit application had been rejected on a previous purchase, and the salesman at Classic suggested that someone co-sign for her. Even so, she "wanted the car and the loan in her name because she was attempting to establish a credit history," according to the brief.

The salesman assured her that the paperwork would reflect that she, not the co-signer, was buying the car, the brief said.

However, the salesman had the co-signer, Nathaniel Nelson, sign another document which indicates that he is the sole purchaser of the vehicle and makes no mention whatsoever of Mrs. Adams.

"This type of financing is commonly known in the automobile business as a straw purchase," the brief said.

The dealership assigned its consumer credit contract to Ford Motor Credit, and Mrs. Adams started to make payments. But within three months, Ford Motor Credit discovered the transaction involved a straw purchase and required Classic to buy back the contract, the brief said.

Buckley claims that should not have been a problem, since Mrs. Adams could have continued her monthly payments to the dealership.

Instead, Classic officials asked Ms. Adams to bring in the car and once there, "they had someone drive it to the back of the lot," said lawyer Donald H. Howe, who also represented Mrs. Adams.

After losing possession of the car, Mrs. Adams next tried to get back her trade-in and the down payment. Classic declined

Please see CAR, Page 3-B

on both cases, eventually explaining it was keeping the car and $1,000 because "it had lost so much money on the deal," according to the brief.

Howe said the jury's sizable award was for a reason. "I think they were saying this is the kind of person (the consumer protection) law was made for. They were clearly sending a message that people shouldn't be treated this way."

Gowder declined to discuss specifics of the appeal. He did say, though, that one of the grounds is likely to be that the actual damage figure is "unsupported" by the evidence.

It's unclear who is liable in this case. Classic since has been sold, first becoming Heritage Lincoln Mercury Inc. and now John Parker Lincoln-Mercury Inc.

In the brief, Buckley argues that if the lawyer for Classic lets Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, "he may be mistaken." Gowder said since the case is on appeal, there's no reason to speculate on liability.

According to the brief, lawyers for Mrs. Adams agreed earlier this year to settle for $25,000. Classic offered $1,100 and no agreement was

The News and Courier

REGION

Thursday, August 3, 1989

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APPENDIX 8

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	CASE NUMBER:
	)	88-CP-10-3834
YULONDA ADAMS,	)	
Plaintiff,	)	
	)	
vs.	)	PRE-TRIAL BRIEF
CLASSIC LINCOLN MERCURY, INC.,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure, hereby submits the following Pre-Trial Brief:

1. STATEMENT OF FACTS

This is an action for conversion, fraud (or constructive fraud) and violation of §§ 56-15-30 and 40 based upon multiple misrepresentations, wrongful repossession, and failure to return the Plaintiff's trade-in or down payment upon the repossession of a new vehicle she had purchased from the Defendant.

On October 17, 1987, the Plaintiff purchased a 1988 Mercury Topaz from the Defendant. As part of the consideration, she gave the Defendant a cash down payment of One Thousand ($1,000.00) Dollars and gave them her 1977 Oldsmobile Cutlass. The Plaintiff took delivery of

this car and drove it until October 22, 1988, when the Defendant informed her that Ford Motor Credit had rejected her credit application. At the Defendant's request, she returned the car, because her credit had not been approved. She had purchased the Topaz with thirty-five (35) miles on it and drove it at least an additional two hundred (200) miles while she had it in her possession, including a trip to Voorhees College in Denmark, South Carolina. The Defendant later sold this vehicle to Teresa Ellington, certifying that the odometer reading of eighteen (18) miles was true and accurate.

When she returned the Topaz on October 22, 1987, the Plaintiff agreed to purchase a less expensive car, a 1988 Mercury Tracer. The Defendant retained possession of the Plaintiff's Oldsmobile Cutlass, and it retained her $1,000.00 cash down payment. Because of her prior credit problem with the Topaz, the Plaintiff arranged for Nathaniel Nelson to co-sign for her. The Defendant assured the Plaintiff that it would fill out the proper paper work on her behalf so that it would reflect that she was buying the 1988 Tracer and that Nathaniel Nelson would be co-signing on her loan. The Plaintiff wanted the car and the loan in her name because she was attempting to establish a credit history. Nathaniel Nelson wanted the car and the contract in Mrs. Adams' name because he was trying to help her establish her credit, and he definitely did not want another car in his name.

The Defendant had the Plaintiff and Mr. Nelson sign one set of documents reflecting that she was the buyer and he was co-signer. The Defendant's salesman took the documents directly to Mr. Nelson's place of employment where he signed them as requested. In addition, the

Defendant returned approximately one-half hour later and had Nathaniel Nelson sign another document which indicates that he is the sole purchaser of the vehicle and makes no mention whatsoever of the Plaintiff. The type of financing application is commonly known in automobile business as a "straw purchase".

The Defendant entered into a consumer credit contract with the Plaintiff in which it agreed to finance her purchase. The contract apparently was destroyed by the Defendant, because the only contract which now exists is the second contract which was signed by Nathaniel Nelson and which does not mention Yulonda Adams at all. Neither Mrs. Adams nor Mr. Nelson ever received copies of any documents they signed pertaining to the Tracer. The Defendant assigned its consumer credit contract for the Tracer to Ford Motor Credit without recourse.

Approximately three (3) months after the Plaintiff purchased her vehicle, Ford Motor Credit discovered that the transaction involved a "straw purchase", and it immediately required the Defendant to repurchase the consumer credit contract, because the Defendant had misrepresented the nature of the transaction. The Defendant then asked the Plaintiff to return to the dealership to discuss the matter.

Upon arriving at the dealership, the Plaintiff's 1988 Tracer was repossessed and taken by the Defendant without Plaintiff's authorization, and it has never been returned to her. The Plaintiff was never given the Notice of Right to illegible required under § 37-5-110. After the Defendant repossessed the Tracer, the Plaintiff requested

that the Defendant return the 1977 Oldsmobile Cutlass to her and her $1,000.00 down payment. The Defendant then agreed to return her trade-in to her along with the $1,000.00 down payment. However, her trade-in had been sold by the Defendant, and the Defendant later refused to return her $1,000.00 down payment to her or the value of her trade-in.

The Plaintiff was forced to leave the dealership without her old car or her new car or her money, and the Defendant has kept her old car, her new car and her money. The Defendant eventually explained to her that the reason it was keeping her car and her money was because of the fact that it had lost so much money on this deal.

2. FACTS IN CONTROVERSY

The Defendant claims that the reason it terminated the contract with the Plaintiff is because of the fact that her check for the first month's payment bounced, so that the contract was terminated by Ford Motor Credit and consequently was also terminated by the Defendant. However, Ford Motor Credit unequivocally states that the reason for termination of the contract was because of the misrepresentation by the Defendant as to the nature of the transaction. According to Ford Motor Credit, the fact that the check for the first payment bounced had absolutely nothing to do with the fact that it required the Defendant to repurchase the contract. In fact, after the first check bounced, Ford Motor Credit accepted an additional payment check from Yulonda Adams which did not bounce.

There will also be some controversy as to the exact number of contracts executed by Yulonda Adams and Nathaniel Nelson, and the contract signed by Yulonda Adams for the Tracer apparently has been destroyed. The various representations made by the Defendant's agents, including its salesmen, its sales manager, and its finance manager will all be disputed.

3. LEGAL ISSUES

The Plaintiff alleges four (4) causes of action: 1) conversion of the 1977 Oldsmobile and the $1,000.00 down payment; 2) conversion of the 1988 Tracer in violation of § 37-5-111(7); 3) fraud or constructive fraud and; 4) violations of §§ 56-15-30 and 56-15-40.

A. Conversion of the trade-in and down payment.

Conversion is defined under our law as an unauthorized assumption and exercise of the right of ownership over goods or chattels belonging to another, to the exclusion of the owner's rights. *Owens v. Andrews Bank and Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975). The Defendant had no right whatsoever to retain the Plaintiff's trade-in or her down payment, because possession of those items of her property was contingent upon her purchase and receipt of the 1988 Tracer. When the Defendant unilaterally cancelled the contract for the Tracer, the Defendant no longer had any right to possession of either the trade-in or the down payment. In fact, the Defendant advised the Plaintiff initially that the trade-in and her down payment would be returned to her, but the Defendant subsequently told her that neither the trade-in nor

her down payent would be returned because the Defendant had lost too much money on the deal.

As a general rule, the measure of damages for the conversion of personal property is the value of the property with interest thereon, and the jury may give the highest value up to the time of trial. *Industrial Welding Supplies, Inc. v. Atlas Vending Co.*, 276 S.C. 196, 277 S.E.2d 885 (1981). Where money has been converted, the measure of damages is its amount with legal interest from the date of conversion. *Mack v. Riley*, 316 S.E.2d 731 (S.C. App. 1984). In addition to actual damages, the Plaintiff may recover punitive damages against the Defendant if the jury finds that the Defendant acted with conscious indifference to or in reckless disregard of the Plaintiff's rights. *Long v. Gibbs Auto Wrecking Co.*, 171 S.E.2d 155 (S.C. App. 1969).

B. Conversion of 1988 Tracer in violation of § 37-5-111(7)

In addition to the Plaintiff's claim for conversion of the 1977 Oldsmobile and the $1,000.00 down payment, she is entitled to the damages for the Defendant's conversion of her 1988 Tracer in violation of The South Carolina Consumer Protection Code, §§ 37-5-110 and 37-5-111. Under § 37-5-110, a creditor is required to give notice of the consumer's right to cure before repossessing collateral securing a consumer loan. Under § 37-5-111(1), a creditor may neither accelerate maturity of an obligation nor take possession of collateral securing that obligation until twenty (20) days after a notice of the consumer's right to cure is given. The Defendant gave no notice in

this case. Under § 37-5-111(7), any repossession of collateral in violation of this section is void and the creditor is liable for conversion.

Although the title to the Tracer was placed by the Defendant in Mr. Nelson's name, the car actually belonged to the Plaintiff, and there is no question that she had the right to immediate possession of it at the time of conversion. As stated in *Owens v. Andrews Bank & Trust Co., supra,* "An immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the Plaintiff to maintain his action."

Of course, the same measure of damages applies for this act of conversion, so that the Plaintiff is entitled to the value of the Tracer plus interest, along with punitive damages if the jury finds that the Defendant acted with conscious indifference to or in reckless disregard of the Plaintiff's rights.

C. Fraud or constructive fraud

The Plaintiff alleges that the Defendant's preparation of the sales documents for the 1988 Tracer in a manner so that it constituted what is known in the financial industry as a "straw deal" establishes the Defendant's fraud or constructive fraud. The Defendant represented to the Plaintiff that the title to this vehicle would be placed in her name and that Nathaniel Nelson would be allowed to co-sign on the retail installment contract. Apparently, the Defendant then had both the Plaintiff and Nathaniel Nelson sign one retail installment contract and later had Nathaniel Nelson sign another retail installment contract by himself, so that Yulonda Adams' appears nowhere on

that document. The Defendant then had the car titled in the name of Nathaniel Nelson and made no mention whatsoever of Yulonda Adams' existence to Ford Motor Credit. The contract signed by both Yulonda Adams and Nathaniel Nelson does not exist.

The Plaintiff alleges that the representations concerning the method of financing and the titling of this vehicle were material to her; that she relied upon them; that they were false; that she was ignorant of their falsity; that she had a right to rely on their truth; that the Defendant knew or should have known that the representations were false or acted with reckless disregard for the true [sic] or falsity of those representations; that the Defendant intended the Plaintiff to rely upon their truth in agreeing to purchase the Tracer; and that the Plaintiff was proximately injured by relying upon these representations.

Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the feasor, the law declares [sic] fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither dishonesty of purpose nor intent to deceive are necessary elements of an action for constructive fraud, and the existence or nonexistence of such intent to deceive distinguishes actual fraud from constructive fraud. *Greene v. Brown*, 199 S.C. 218, 19 S.E.2d 114 (1942); *Giles v. Lanford and Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct.App. 1985).

D. Violation of §§ 56-15-30 and 40

The Plaintiff in her fourth cause of action alleges numerous violations of §§ 56-15-30 and 40 which prohibit

any conduct by a motor vehicle dealer which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public. In the case of *Adams vs. Grant*, 292 S.C. 581, 358 S.E.2d, 142 (Ct.App. 1986) our Court of Appeals held that an automobile dealer's refusal to make promised repairs "because he did not have that much tied up in the car" created a jury question as to a violation of these code sections. Therefore, it follows that the Defendant's treatment of the Plaintiff in this case unquestionably creates a jury question as to whether the Defendant violated the Act and as to whether the Defendant's violation was malicious.

Under § 56-15-110, the Plaintiff, upon proof of a violation, is entitled to double her actual damages, reasonable attorney's fees and the costs of this action. If the jury finds that the Defendant's violation was malicious, the jury may also award punitive damages not to exceed three (3) times the Plaintiff's actual damages.

Because the terms malicious and willful have been used interchangeably under our law to describe conduct warranting the award of punitive damages, the Court should apply the standard set forth within *State ex rel Medlock v. Nestegg Society Today, Inc.*, 348 S.E.2d 381 (S.C. App. 1986), to allow the jury to determine whether or not the Defendant's conduct was malicious. Under that definition of willfulness, the Court held that a violation of the South Carolina Unfair Trade Practices Act is willful if, in the exercise of due diligence, a person of ordinary prudence could have ascertained that his conduct violates the act. Thus, if a person of ordinary prudence could have ascertained that his conduct was arbitrary, in bad faith or unconscionable, then such a violation constitutes a willful

or malicious violation of the Act warranting an award of punitive damages not to exceed three (3) times actual damages.

4. WITNESSES AND EXHIBITS

A. Witnesses

1. The Plaintiff and her husband, Broderick Adams, will testify to the facts surrounding the sale, the discussions she had with the salesman, and the facts surrounding her return of the vehicle and her demand for her money and her trade-in. Mrs. Adams will also testify to the value of the 1977 Oldsmobile and the 1988 Tracer.

2. Nathaniel Nelson will testify as to his involvement in the sale and his conversations with various agents of the Defendant.

3. Larry Turner of Ford Motor Credit Company will testify as to his knowledge of the facts of this transaction and the reason Ford Motor Credit required the Defendant to repurchase its retail installment contract for the 1988 Tracer. In addition, Mr. Turner will testify that the Plaintiff was not in default under the terms of her agreement and that the Plaintiff did nothing to cause Ford Motor Credit to require the Defendant to repurchase this contract. The only reason the contract was repurchased is because of the material misrepresentation of the nature of the transaction by the Defendant to Ford Motor Credit.

4. The Plaintiff's mother will testify that the 1977 Oldsmobile was actually titled in her name, but she does not have a drivers license and never has had one, and the

vehicle was actually owned by her daughter, Yulonda Adams.

B. Exhibits

The Plaintiff will introduce the various buyer's orders, a certified copy of the title history for the vehicles from the Highway Department, the retail installment contracts, the records of Ford Motor Credit and the financial statements of the Defendant.

5. UNUSUAL EVIDENTIARY MATTERS

The Plaintiff does not anticipate any unusual evidentiary matters.

6. UNUSUAL MATTERS

The only unusual matter in this case involves the identity of the Defendant. Apparently, the dealership was sold, and the name was changed to Heritage Lincoln Mercury, Inc. Subsequently, the dealership was again sold to John Parker, and it is now John Parker Lincoln-Mercury, Inc. However, the Defendant made no attempt to comply with the Bulk Sales Act, and Heritage has filed an affidavit with the South Carolina Department of Highways and Public Transportation swearing that Classic and Heritage are one and the same dealership. Therefore, if the Defendant's attorney believes that his client can sit back and let Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, he may be mistaken.

7. SETTLEMENT NEGOTIATIONS

The Plaintiff has offered to settle this case for $25,000.00. The Defense has offered $1,100.00. The Defendant has made no meaningful offer of settlement. Therefore, it appears settlement of this case is most unlikely.

Respectfully submitted,

BAILEY AND BUCKLEY

/s/ Edward D. Buckley, Jr.
Edward D. Buckley, Jr.
P. O. Box 953
Charleston, SC 29402
(803) 722-4092

ATTORNEYS FOR THE PLAINTIFF

Charleston, SC

Date: June 19, 1989

APPENDIX 9

STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	COMMON PLEAS
COUNTY OF CHARLESTON)	NINTH JUDICIAL
)	CIRCUIT
JOHN R. PARKER,)	CASE NO.:
Plaintiff,)	90-CP-10-3649
)	
-vs-)	
EVENING POST PUBLISHING)	SUMMONS
COMPANY AND JIM PARKER,)	
)	(Jury Trial)
Defendant.)	
)	(Filed Aug. 9, 1990)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to make a written Answer to the Complaint in the above captioned action, a copy of which Complaint is herewith served upon you, and to serve a copy of your written Answer to the said Complaint upon the undersigned attorney within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint in writing within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

WALTER BILBRO & ASSOCIATES, P.A.
11 Gamecock Ave. Suite 1105
P.O. Box 31699
Charleston, S.C. 29417
Telephone: (803) 763-7776

RANDALL M. CHASTAIN
418 Edisto Avenue
Columbia, S.C. 29205
Telephone: (803) 777-7750

BY: /s/ Walter Bilbro, Jr. (VHJ)
WALTER BILBRO, JR.

Dated at Charleston, S.C.
this 8 day of August, 1990.

APPENDIX 10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
JOHN R. PARKER, Plaintiff,	)	CASE NO. 90-CP-10-3649
versus-	)	
EVENING POST PUBLISHING CO., and JIM PARKER, Defendants.	)	COMPLAINT (Jury Trial)
	)	(Filed Aug. 9, 1990)

The Plaintiff, JOHN R. PARKER, through his undersigned attorneys, respectfully shows unto this Honorable Court that:

1. The Plaintiff is a citizen and resident of the County of Charleston, State of South Carolina.

2. The Defendant Evening Post Publishing Company (hereinafter *Post*) is a corporation licensed to do business in the State of South Carolina which publishes two newspapers of general circulation in the Counties of Charleston, Berkeley, Dorchester, Georgetown, Colleton and Beaufort in the State of South Carolina. These newspapers are called "The News and Courier" and "The Evening Post".

3. The Defendant Jim Parker is on information and belief an individual employed by the Defendant *Post* as a newspaper reporter who was at all times herein acting as agent, employee or servant of the Defendant *Post*.

4. On or about 3 August 1989, the Defendant published an article by-lined by Defendant Parker (and therefore on information and belief written by Defendant Parker) entitled "Car Buyer Awarded $700,000 in Dispute", wherein it was reported that Classic Lincoln Mercury, Inc. was ordered by Circuit Judge Ralph K. Anderson to pay $42,600 in actual damages and $642,600 in punitive damages to one Yolonda Adams upon a jury finding that Classic had engaged in an unfair trade practice. See Exhibit A attached hereto.

5. In the *Post* article referenced in ¶ 4, Defendant *Post* and Defendant Parker also stated that "it is unclear who is liable in" the *Yolanda Adams* case in that the Defendant Classic therein had been sold, first becoming Heritage Lincoln Mercury, Inc. and "now John Parker Lincoln-Mercury, Inc." The article further states that John Parker is possibly liable for any judgment awarded to Yolanda Adams.

6. The Defendant *Post* and the Defendant Parker, by the article, led the public and any ordinary reader to believe that John Parker Lincoln-Mercury, Inc. and specifically John Parker himself was involved in and responsible for the unfair trade practices and the large judgment awarded to Yolanda Adams.

7. In this article, Defendants recklessly, wantonly, intentionally and with disregard of Plaintiff's rights, communicated false and misleading statements and communications falsely alleging that John Parker had thus acted in ways which would have been, if true, violative of the laws and public policy of the State of South Carolina, as well as contrary to public morality and mores in this

State. Defendants' statements and communications were not true about John Parker.

8. The Plaintiff, until the commission of the grievances by the Defendants specified herein, was not suspected of conduct, practices or other actions of any sort which were improper or contrary to law, public policy or morality, was a holder of an excellent credit standing and business reputation, and was in a rising business mode of expansion and good business action overall with excellent financial prospects.

9. At all times, the statements published by the Defendant *Post* and written by the Defendant Parker were and are totally false. The statements have greatly injured John Parker in his good name, fame, general reputation, business reputation, credit standing and reputation for good and moral conduct in personal and business affairs; they have exposed him to humiliation, contempt and/or ridicule; they have caused, and continue to cause, persons to question his reputation for truthfulness in both personal and business dealings; and they have caused serious damage overall to Plaintiff's ability to exist and conduct business in the community.

10. The statements were made by the Defendants with a reckless disregard for the truth and with malice towards the Plaintiff.

11. The Defendants' statements defame and disparage John Parker in his personal life and in his professional and business reputations. The Defendants' statements and the logical inferences drawn therefrom by third parties have also been republished by others to John Parker's further and continuing harm.

12. The Plaintiff, John Parker, is informed and believes that the statements published by the Defendant *Post* and written by the Defendant Parker are libelous *per se*, as are the numerous re-publications by third parties who have read or heard about the Defendants' published statements.

13. On information and belief, the Defendants publicized and communicated to third persons with express, reckless and wanton disregard for the Plaintiff's right to privacy and in such a manner as to outrage and cause mental suffering, shame and humiliation to Plaintiff. To a person of ordinary sensibilities, such false and defamatory statements falsely and wrongfully imputed to John Parker illegal actions violative of the laws and public policy of the State of South Carolina, in all of which matters, due to the falsity thereof, the public and any third person had no interest or legitimate concern.

FOR A FIRST CAUSE OF ACTION
(False Light/Invasion of Privacy)

14. The provisions of Paragraphs 1 through 13 hereinabove are repeated as though set forth *verbatim* at this point.

15. The said statements and publicity have unreasonably placed the Plaintiff in a false light in the public eye and have damaged his relations with others in the community thereby in a manner calculated to prevent him from having dealings with them on a personal or business level in the manner in which he had been accustomed.

16. By reason of the stated invasion of privacy and placement in a false light, and as a direct and proximate result thereof, the Plaintiff has been damaged in actual and punitive amounts to be set by the jury, said damages including, without limitation, damages for loss of contract relations, interference and loss of his abilities to conduct business, loss of earning ability, embarrassment, humiliation, mental distress and suffering, and other matters, all as set forth hereinabove.

FOR A SECOND CAUSE OF ACTION
(Defamation)

17. Plaintiff here repeats, as though set forth *verbatim* in this Complaint, the allegations of Paragraphs 1 through 13 and Paragraphs 15 and 16.

18. On or about 3 August 1989, the Defendants recklessly, willfully or maliciously, did communicate false information as aforesaid regarding John Parker's behavior and activities generally and his business activities especially to various third persons. Such defamatory statements imputed to John Parker dishonesty and such violations of the laws and public policies and morality of the State of South Carolina; imputed to John Parker the inability to lawfully and properly perform the functions of his trade or business of automobile dealer; and imputed that John Parker was inadequate or incompetent in his business capacity. Thereby the Defendants impeached the honesty, integrity, virtue and reputation of the Plaintiff and exposed him to public hatred, contempt, ridicule and obloquy, causing him to be shunned, avoided

or patronized and injuring John Parker in his business and occupation and in his personal relations.

19. Defendants' defamatory communications as set forth above have directly and proximately caused special, actual and punitive damages to the Plaintiff in amounts to be set by the jury.

20. WHEREFORE, Plaintiff prays that this Honorable Court examine this matter, inquire into it and instruct the jury according to the causes, and award the Plaintiff such special, general and punitive damages as shall be deemed appropriate, plus costs as shall be deemed appropriate.

WALTER BILBRO & ASSOCIATES, P.A.
11 Gamecock Ave. Suite 1105
P.O. Box 31699
Charleston, South Carolina 29417
Telephone: (803) 763-7776

Randall M. Chastain
418 Edisto Avenue
Columbia, South Carolina 29205
Telephone: (803) 777-7750

ATTORNEYS FOR PLAINTIFF

BY: /s/ Walter Bilbro, Jr.
WALTER BILBRO, JR.

Charleston, SC
August 8, 1990

(JURY TRIAL)

(2)

Supreme Court, U.S.
FILED
FEB - 9 1996
CLERK

No. 95-1085

In The

Supreme Court of the United States

October Term, 1995

JOHN R. PARKER,

Petitioner,

vs.

EVENING POST PUBLISHING CO. AND JIM PARKER,

Respondents.

On Petition For A Writ Of Certiorari To The South Carolina Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

JAY BENDER
Counsel of Record
CHARLES EDWARD BAKER
BAKER, BARWICK, RAVENEL
& BENDER, L.L.P.
1730 Main St.
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091

D.A. BROCKINTON, JR.
BROCKINTON, BROCKINTON
& KERR
51 State St., Post Office Box 633
Charleston, South Carolina 29402
(803) 722-8845

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is an individual who acquires an ownership interest in the assets of an automobile dealership which is located in a community in which the individual formerly was in the automobile dealership business and, who, while managing the dealership which is the subject of the purchase pending closing of the sale, advertises that he is back in the car business at that dealership's business name a public figure with respect to a claim of libel arising out of a media report of his potential liability for a judgment obtained against the former owners of the dealership assets for fraudulently structuring a straw purchase in the sale of a vehicle to a consumer?

2. In a news article about a judgment obtained against a former automobile dealership for fraudulently structuring a straw purchase in the sale of a vehicle to a consumer, does the media defendant invade the privacy of a private individual who had formerly been in the automobile dealership business in the same community and had subsequently acquired an ownership interest in the assets of the dealership against whom the judgment was obtained and who advertised that he was back in the car business at that dealership's business name while managing the dealership pending closing of the sale when the media defendant reports in the article that the individual may be personally liable for the judgment?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the proceeding in the Court below are contained in the caption of this Respondents' Brief in Opposition.

Respondent Evening Post Publishing Co. is a South Carolina corporation which owns a 60% interest of the Buenos Aires Herald, an Argentina Company (the other 40% interest therein being owned by various Argentinean citizens), but Evening Post Publishing Co., as the parent company, does not otherwise have any parent companies or any subsidiaries other than its wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Evening Post Publishing Co. and Jim Parker, respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner, John R. Parker.

OPINIONS BELOW

Respondents adopt the statement of the Opinions Below set forth in the Petition.

JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a). Respondents question the Supreme Court's jurisdiction at I, *infra*.

CONSTITUTIONAL PROVISION AND APPELLATE COURT RULE INVOLVED

U.S. CONST. amend. I

The text of this provision is reproduced in the Appendix to the Petition at Pet.App. p. 6-1.

Rule 220(c), South Carolina Appellate Court Rules

> *Affirmance on Any Ground Appearing in Record.* The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.

COUNTERSTATEMENT OF THE CASE

Respondents submit the following as a counterstatement of the case in order to correct inaccuracies in the STATEMENT OF THE CASE in the petitioner's Petition, including matters stated in said Petition under the separate heading of "STAGE AT WHICH FEDERAL QUESTION WAS RAISED:"

This action was commenced in the Court of Common Pleas for Charleston County, South Carolina, by petitioner, John R. Parker, against respondent Evening Post Publishing Co., publisher of the *News and Courier* newspaper in Charleston, South Carolina, and respondent Jim Parker, a reporter for that paper, upon a Complaint alleging libel and invasion of privacy based upon an article written by respondent Jim Parker published in the *News and Courier* on August 3, 1989. The article concerned the outcome of a lawsuit by Yulonda Adams ("Adams") against Classic Lincoln-Mercury, Inc. ("Classic"), an automobile dealership, over Classic's use of a so-called "straw purchase" in the October, 1987, financing of Adams' vehicle purchase.

On December 13, 1988, petitioner and Jack M. Mills ("Mills") (an individual not a party to this action), entered into an Asset Purchase Agreement with Classic, then doing business as Heritage Lincoln-Mercury, to purchase the assets of Classic (R.pp. 267-269; R.p. 839).[1] At the same time, petitioner entered into a Management

---

[1] References to the Record on Appeal before the South Carolina Court of Appeals are designated herein by the letter "R."

Agreement by which he agreed to manage and operate the Heritage dealership pending approval of the sale by the manufacturer and the closing of the sale (R.pp. 274-276; R.p. 867; R.p. 871). Pursuant thereto, petitioner took over the management and operation of the Heritage dealership on December 26, 1988 (R.p. 276).

Petitioner had previously been in the automobile dealership business in Charleston. When he entered upon the operation of Heritage Lincoln-Mercury under the Management Agreement, he ran newspaper and radio ads in his individual name announcing that he was back in the car business at Heritage Lincoln-Mercury (R.pp. 364-365.)

On March 13, 1989, a corporation named Parker Lincoln-Mercury, Inc. was organized for the purpose of taking over and operating the dealership upon the closing of the purchase (R.pp. 422-423; R.p. 937). Mills held 85% of the stock of that corporation and petitioner held 15% of the stock.

The Asset Purchase Agreement was closed on May 30, 1989 (R.p. 918) with title to the assets being conveyed to petitioner and Mills, as Buyer (R.p. 916). The Closing Memorandum provided that the Seller, in lieu of compliance with the South Carolina Bulk Sales Act, would pay all creditors (other than creditors by reason of the Buyer's management of the previous dealership assets by Buyer under the Management Agreement) when due and would hold the Buyer harmless from any claim of a creditor (R.p. 920).

The action by Adams against Classic was pending at the time of the execution by petitioner of the Asset Purchase Agreement and at the time of the closing of the purchase. In June, 1989, the attorneys for Adams submitted a Pre-trial Brief in the action against Classic which stated under the heading "UNUSUAL MATTERS" as follows:

> The only unusual matter in this case involves the identity of the Defendant. Apparently, the dealership was sold, and the name was changed to Heritage Lincoln Mercury, Inc. Subsequently, the dealership was again sold to John Parker, and it is now John Parker Lincoln-Mercury, Inc. However, the Defendant made no attempt to comply with the Bulk Sales Act, and Heritage has filed an affidavit with the South Carolina Department of Highways and Public Transportation swearing that Classic and Heritage are one and the same dealership. Therefore, if the Defendant's attorney believes that his client can sit back and let Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, he may be mistaken.

(Pet.App. p. 8-11.)

The Adams' case was tried in July, 1989, and resulted in a verdict for Adams, with judgment being entered thereon against Classic on July 28, 1989, in the total amount of $716,000.50, including actual and punitive damages, attorney's fees and costs.

There was evidence in the instant case that both the judgment and the plaintiff's Pre-trial Brief in the Adams case were contained in the record of the Adams' case on file in the Office of the Clerk of Court for Charleston

County. Utilizing the Pre-trial Brief, the judgment and information obtained from the attorneys in the Adams case, respondent Jim Parker wrote the news article which is the subject of the present lawsuit (Pet.App. p. 7-1). The article described the judgment as rendered against Classic and the alleged conduct of Classic that led to the judgment as related in the Pre-trial Brief, which included Classic's use of a "straw purchase" in the sale of the car to Adams and Classic's subsequent repossession of the car in October, 1987. The article related information supplied by Classic's attorney that the case had been appealed and stated toward the end of the article:

> It's unclear who is liable in this case. Classic since has been sold, first becoming Heritage Lincoln Mercury Inc. and now John Parker Lincoln-Mercury Inc.
>
> In the brief, Buckley [Adams' attorney] argues that if the lawyer for Classic lets Mrs. Adams obtain a judgment against Classic without risk to Heritage or John Parker, "he may be mistaken . . . " Gowder [Classic's attorney] said since the case is on appeal, there's no reason to speculate on liability.

(Pet.App. p. 7-1.)

On August 9, 1989, Adams filed an Amended Complaint against petitioner, Mills and Parker Lincoln-Mercury, Inc., for recovery of the judgment from the assets purchased from Classic, alleging violation of the South Carolina Bulk Sales Act. That action was subsequently settled with funds paid "by or on behalf" of them (R.p. 941). The funds were apparently paid by Classic

pursuant to the indemnification clause in the Closing Memorandum.

The petitioner's Complaint in the instant case alleges that the aforesaid article stated that petitioner was possibly liable for any judgment awarded to Adams and that by the article, respondents falsely led the public and any ordinary reader to believe that John Parker Lincoln-Mercury, Inc., and specifically John Parker himself, was involved in and responsible for the unfair trade practices, fraud and consumer practices and criminal acts of Classic and the large judgment awarded to Adams (Pet.App. p. 10-2). The first of two separately stated causes of action in the Complaint is characterized "FALSE LIGHT/INVASION OF PRIVACY" (Pet.App. p. 10-4) and the second of the said causes of action is characterized "DEFAMATION" (Pet.App. p. 1-5). Petitioner sought recovery of "special, general and punitive damages" (Pet.App. p. 10-6).

Upon trial of petitioner's action, the trial judge granted respondents' motion for directed verdict as to petitioner's claim for invasion of privacy under the "false light" theory, which had not been officially recognized in South Carolina, and also under the public disclosure of private facts theory, pointing to the principle that the right of privacy does not prohibit publication of matters which are of "legitimate public concern" (R.p. 495.)

The cause of action for libel was submitted to the jury. The jury instructions placed upon petitioner the burden of proving falsity of the information and also that respondents negligently reported the false information. It was petitioner's theory of recovery that the statements

were libelous *per se*. The trial judge charged that the plaintiff was required to prove that the defendant "acted with malice" in writing and publishing the words (R.p. 773) and that a libelous *per se* statement is one in which malicious intent is presumed (R.p. 774). The jury was also instructed that implied malice would support an award of actual damages (R.p. 781) and that petitioner was required to prove actual damages (R.p. 781). The trial judge did not require proof of actual malice for recovery of actual damage proved by petitioner and did not indicate to the jury, expressly or by implication, that petitioner was a public figure.[2]

Petitioner's counsel took exception to the trial judge's failure to charge various specific requests to charge submitted by petitioner. One of those requests provided for the respondents to have the burden of proving truth. The remaining requests provided in effect for recoverability of presumed damages without including the requirement that constitutional malice be shown.

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[2] In the charge on damages, the trial judge specifically used the term "private person," saying:

> . . . a private person may recoup for defamation if he believes that the defamatory language was published and that he suffered some actual injury. He need not prove a dollar amount of damage in order to recover. A private person may also recover punitive or exemplary damages, if he proves actual malice. That is if the defendants acted with actual knowledge that the charge was false or that it was made with reckless disregard for the truth.

(R.p. 780, lines 11-18.)

The jury returned a verdict in favor of respondents. Petitioner moved for a new trial or judgment notwithstanding the verdict, which was denied by Order dated August 5, 1992 (Pet.App. p. 2-1). The Order denying petitioner's post-trial motion sets forth the petitioner's contentions with respect to the motion:

> . . . The plaintiff asserts that the court erred in requiring the plaintiff to prove that the news story was false, published with fault on the part of the defendants and caused actual injury to the plaintiff; that the invasion of privacy claim should have been for the jury, and that the jury verdict was unjust.

(Pet.App. p. 2-2.)

With respect to the libel claim, the Order continued:

> As he had at trial, plaintiff argues that the communication involving the plaintiff was not of public concern, and the controlling law is the common law of libel unmodified by the constitutional defenses recognized in cases involving communication of material in the public interest. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

(Pet.App. p. 2-2.) The trial judge concluded in the Order with respect to the libel claim:

> Utilizing the Supreme Court's broad definition of what is in the public interest, and recognizing that the story was based on information in a court file leads to the conclusion that the constitutional defenses urged by the defendants were correctly applied. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89

> L.Ed.2d 783 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

(Pet.App. p. 2-3.)

With respect to the invasion of privacy claim, the trial judge concluded in the aforesaid Order that none of the evidence offered by the petitioner supported the claim that the news story publicized private affairs of no legitimate public concern (Pet.App. p. 2-4).

The South Carolina Court of Appeals affirmed the judgment of the trial court (Pet.App. pp. 1-1 through 1-14). On the appeal, petitioner challenged the jury charge on his libel claim, arguing that the trial court improperly placed on him the burden of proving falsity of the statements in the article. He contended that he was a private figure and that the subject matter of the article was of purely private concern, thus placing his libel claim outside the realm of constitutional defamation (see Pet.App. p. 1-6). In the Opinion for which review is sought by petitioner herein, the South Carolina Court of Appeals pointed out that in private figure cases involving matters of public concern, the common law presumption of falsity is invalid and the plaintiff must prove the statement was false, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The Court stated:

> . . . Therefore, as Parker [petitioner herein] conceded at oral argument, the dispositive issue here is whether the article involved a matter of public concern. If so, then Parker's claim is governed by *Hepps*, and the jury was properly charged.

(Pet.App. p. 1-7.)

In a footnote to the above-quoted statement, the Court of Appeals pointed out that whether or not petitioner was considered a public figure, his claim was subject to the requirements of *Hepps* if the challenged statements involved matters of public concern (Pet.App. p. 1-7), stating further that the Court believed, however, that by extensively advertising his return to the car business, petitioner became a public figure, at least in the limited area of his business dealings (Pet.App. p. 1-7). The Court observed that through his advertising campaign, petitioner invited the public's attention and assumed the accompanying risk of that attention and, thus, as to statements regarding petitioner's dealership, it seemed clear that petitioner was a public figure.

With respect to the libel claim, the Court of Appeals found that the entire article, including references to petitioner, involved matters of public concern and that the trial court properly placed on petitioner the burden of proving falsity (Pet.App. p. 1-9). In addition, the Court of Appeals found that upon viewing the evidence and reasonable inferences in the light most favorable to petitioner, the article was substantially true as a matter of law, which, under South Carolina law, was an absolute defense that mooted all jury charge questions and was a reason for affirmance of the defense verdict (Pet.App. pp. 1-9, 1-10).

Because the Court of Appeals found that the article involved matters of legitimate public concern, the Court held that petitioner's invasion of privacy claim for public disclosure of private facts failed under the South Carolina substantive law providing that a cause of action for public disclosure lies only for disclosure of private facts

which are of no legitimate public concern. The Court noted petitioner's acknowledgement at oral argument that if the statements in the article were of legitimate concern to the public, both his libel and invasion of privacy challenges would fail (Pet.App. p. 1-11).

The Court of Appeals found that petitioner's argument regarding false light was "so conclusory as to be an abandonment of the issue" and therefore determined that it would not consider whether the tort of false light exists in South Carolina (Pet.App. p. 1-10).

The South Carolina Court of Appeals denied a petition of petitioner for rehearing on January 26, 1995, (Pet.App. p. 3-1) and the Supreme Court of South Carolina denied a petition of petitioner for a writ of certiorari on October 5, 1995 (Pet.App. p. 4-1).

REASONS FOR DENYING THE WRIT

I. The Supreme Court Has No Jurisdiction To Review This Case

The judgment of the Court below determined the case in favor of respondents with respect to both the petitioner's cause of action for invasion of privacy and the petitioner's cause of action for libel and petitioner has included in the Questions Presented for Review in the Petition a question relating to each of those causes of action.[3]

[3] Neither of the Questions Presented for Review as stated by petitioner is accurately expressed in the actual circumstances

No federal question was involved in or determined by the decision of the South Carolina Court of Appeals regarding petitioner's invasion of privacy claim so as to provide a jurisdictional basis for this Court to review the judgment with respect thereto. The affirmance of the directed verdict on the invasion of privacy cause of action was based upon state law. Although the Court of Appeals determined the question of whether the statements in the news article were matters of public concern, the determination of that question was not made with respect to the invasion of privacy claim as a First Amendment issue. The Court of Appeals determined that question in connection with the invasion of privacy claim in deciding whether the claim met the requirement of South Carolina substantive law for an invasion of privacy cause of action under the theory of public disclosure of private facts that there be "disclosure of private facts which are of no legitimate public concern," as enunciated in *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct.App. 1984) (Pet.App. p. 1-11).

There is also no jurisdictional basis for this Court to review the judgment with respect to the libel claim. Petitioner's Question Presented for Review relating to the libel claim pertains to whether the petitioner had the status of a public figure. As discussed at II, *infra*, that

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of the case and respondents have accordingly restated them in this brief in opposition in order to set forth the correct circumstances concerned. Respondents contend, however, that there is no basis for jurisdiction in this Court to review the judgment of the Court below under either version of the Questions Presented for Review.

question, although involving First Amendment considerations, was not a dispositive issue before the Court below. The dispositive issue on the libel claim was whether the news article involved matters of public concern. In contrast to the invasion of privacy claim, the public concern issue was a First Amendment issue as to the libel claim, necessary for resolution in order to determine the applicability of the requirement of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that a private figure plaintiff prove falsity of the statements in a suit for defamation. However, regardless of how the matter of petitioner's status as a public figure may be perceived and regardless of any comments or determinations made by the Court below with respect thereto, or with respect to the issue of whether the statements in the article were matters of public concern, this Court lacks jurisdiction to review the judgment as to the libel claim. Because the Court of Appeals held that the news article was substantially true as a matter of law, which was an absolute defense that mooted all jury charge questions under South Carolina law and was a reason for affirming the defense verdict under Rule 220(c), SCACR, the decision of the Court of Appeals rested on an independent and adequate state ground. It is well settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

II. The Statements Of The South Carolina Court Of Appeals Pertaining To Petitioner's Having The Status Of A Limited Public Figure Do Not Warrant Review By This Court.

The thrust of petitioner's argument for granting the writ is the contention that the South Carolina Court of Appeals erroneously concluded that petitioner was a public figure. The statements of the Court of Appeals relating to whether petitioner was a public figure are contained in a footnote (Pet.App. p. 1-7, fn. 3) in connection with the Court's consideration of petitioner's contention on the appeal that the trial court had erroneously placed upon him the burden of proving falsity in the jury charge on the libel claim. In the body of the Opinion, the Court of Appeals pointed out the principle established by *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that in private cases involving matters of public concern, the common law presumption of falsity is invalid and the plaintiff must prove the statement was false. The Court of Appeals then specifically stated that, therefore, the "dispositive issue" was whether the article involved a matter of public concern (Pet.App. p. 1-7). Further, in the footnote, the Court of Appeals specifically pointed out that "whether or not" petitioner was considered a public figure, his claim was subject to the requirement of *Hepps* if the challenged statements involved matters of public concern (Pet.App. p. 1-7, fn. 3). It is thus apparent that the statements of the Court of Appeals in the footnote expressing the Court's view that by extensively advertising his return to the car business, petitioner became a public figure in the limited sense of his business dealings and that petitioner was a public figure as to statements

regarding his dealership are unnecessary to the Court's decision and are *obiter dicta* in the purest form. Even if this Court has jurisdiction in this matter, the Court should not exercise its discretionary review to consider statements that were not necessary to determination of the case. The "compelling reasons" which Rule 10 of the Supreme Court Rules (Rev. 1995) now requires for grant of certiorari clearly continues to imply a reach to a problem "beyond the academic or the episodic" as stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (construing the former Rule criterion of "special and important" reasons).

Moreover, petitioner's own contentions in the case support the conclusion that petitioner was a limited public figure in the sense described by the Court of Appeals for the purposes of his libel claim. Petitioner contended that the article charged that he was involved in the conduct of Classic that led to the judgment. Petitioner publicly promoted his personal identification with the dealership, obviously seeking to establish a good business image. Under petitioner's own theory of the case, the allegedly defamatory statements were directly related to the business image petitioner sought to promote to the public. He would be regarded as a limited public figure with respect to those statements under the analysis in *Sunshine Sportswear & Elec., Inc. v. WSOC Television, Inc.* 738 F.Supp. 1499 (D.S.C. 1989), cited by the Court of Appeals, and other decisions such as *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir. 1983), *cert. denied*, 464 U.S. 830; and *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3rd Cir. 1980).

III. The South Carolina Court Of Appeals' Decision On The Merits Of The Issue Of Whether The Entire News Article Involved Matters Of Public Concern Is Sound And Does Not Call For This Court's Discretionary Review.

The conclusion of the South Carolina Court of Appeals that the entire news article, including references to the petitioner, involved matters of public concern, is eminently sound.

The question of whether speech addresses a matter of public concern for purposes of the First Amendment is "determined by [the expression's] content, form and context . . . as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985), quoting from *Connick v. Myers*, 461 U.S. 138, 147-148 (1983). The South Carolina Court of Appeals correctly followed that approach, taking into account the pertinent facts and circumstances shown by the record. The Court properly considered that the public had an interest in being informed about potential methods of collecting a judgment, particularly when the judgment resulted from unfair credit practices. The Court also properly took into account petitioner's own voluntary acts of publicly announcing his connection with the former dealership and inviting the public to conduct business with him, and the Court correctly reasoned that it was of public interest that "the new owner of the dealership, for whatever reason, might bear some responsibility for the damages in the lawsuit. . . . " (Pet.App. pp. 1-7, 1-8). As the trial judge observed in denying petitioner's motion for a new trial or judgment n.o.v.:

> . . . A determination of what is in the public interest is not to be narrowly made because the constitutional guarantee of freedom of the press allows the public to obtain information necessary on a wide range of topics "to cope with the exigencies of their period." *Thornhill v. State of Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 quoted in *Time, Inc. v. Hill*, 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456 (1967).

(Pet.App. pp. 2-2, 2-3).

It is facially apparent from the Opinion of the Court below that the Court's decision with respect to whether the entire article, including references to petitioner, involved matters of public concern, both for purposes of the libel claim and for purposes of the invasion of privacy claim, is a proper application of applicable law to the evidence and that the decision does not warrant further consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAY BENDER
Counsel of Record
CHARLES EDWARD BAKER
BAKER, BARWICK, RAVENEL
& BENDER, L.L.P.
1730 Main St.
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091

D.A. BROCKINGTON, JR.
BROCKINGTON, BROCKINGTON & KERR
51 State St., Post Office Box 633
Charleston, South Carolina 29402
(803) 722-8845

Counsel for Respondents

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